United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1352

To be argued by
PETER J. BYRNES

In The

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

-against-

ROBERT E. TATE,

Appellant.

BRIEF FOR APPELLANT

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UNITED STATES OF AMERICA,

Appellee,

-against-

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76-1352

ROBERT E. TATE,

Appellant.

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STATEMENT

Appellant, on April 9, 1976 before the Honorable Thomas C. Platt entered a plea of guilty after a denial of his application to enter a plea of Nolo Contendere to a violation of Section 7203, Internal Revenue Code; 26 U.S.C. Section 7203. On May 28, 1976 the Honorable Thomas C. Platt, United States District Judge, sitting in and for the Eastern District at Brooklyn, New York, imposed a sentence of one year imprisonment, execution of which was suspended, and the Appellant was placed on probation for a period of five years. In addition thereto, the sentencing Judge imposed the following special conditions:

1. That the Appellant pay all taxes, interest and penalties owed to the Internal Revenue Service.

2. Pay a fine of Ten Thousand ($10,000.00) Dollars on or before June 30, 1976, payment of which has been stayed pending appeal.

INTRODUCTION

After denial of permission to the Appellant to enter a plea of Nolo Contenderein the case now before this Court, the sentencing Judge, at the recommendation of the United States Attorney, accepted a plea of guilty to one count of the five count Information. However, a review of the application by the Appellant to enter a plea of Nolo Contendere set forth the extenuating circumstances which prompted the Government to accept a plea of guilty to a single count of the Information on April 9, 1976. (31a)*. After the plea was accepted, the sentencing Judge requested the Government to state its position on the issue of bail. (45a-46a). As this case dealt with an attorney who was a member of the Bar in good standing, and admitted to practice in the United States District Court for the Eastern District, and further, by reason of the Appellant having appeared voluntarily on two previous occasions, the United States Attorney stated that the Government did not seek bail in this case. (46a). Notwithstanding that the Appellant had filed in 1974 all of the returns in question and had paid all of the tax in full prior to the entry of the plea, and to the utter amazement of both the United States Attorney and the attorney for the Appellant, the Court took upon itself the imposition of a $5,000.00 bond, which necessitated the Appellant to be treated as a common felon, handcuffed,

* Numerical references in paragraph refer to pages in the Record on Appeal, unless otherwise indicated.

and brought before a sitting magistrate in order to post bail. It was at this point in the proceeding that the Appellant became convinced that the Judge, Thomas C. Platt, was using his power to set bail for the purpose of exacting punishment and humiliation rather than to assure the appearance of the Appellant on the day of sentence.

Between plea and sentence, the attorney for the Appellant was given the opportunity to review the confidential probation report for the purpose of making comments thereon prior to the imposition of sentence. After a review of this report Appellant concluded, amongst other things, the following misstatements of fact:

1. That the Appellant had done nothing towards preparing or filing his tax returns for the years 1969 thru 1973 until after his now deceased wife became a confidential informant for the Internal Revenue Service and fraud agents of that Service made demands upon the Appellant for said returns.

2. Although on March 10, 1976 and without billing, the Appellant paid $40,483.41 to the Internal Revenue Service, his full tax liability, it was alleged that there remained outstanding a liability for $7,473.80 for the year 1968, together with fraud penalties of over $23,000.00. (28a).

3. The report failed to advise the Court that the Appellant in May, 1973, prior to the Internal Revenue Service becoming aware of any failure to file, paid and retained a Certified Public Accountant for the express purpose of preparing and filing the returns which were the subject of the information before the Court. (53n).

As to the third inaccuracy, the Court in its colloquoy with the United States Attorney and counsel for the Appellant expressly pointed out that the failure of the report to so advise the Court clearly went to the issue of willfulness on the part of the Appellant. (3-5). Nonetheless, the Court was still influenced by the other erroneous information contained in the probation report, which was demonstrated by the imposition of the maximum sentence. Although the term of imprisonment was suspended, an onerous and improper use of probation was resorted to by the imposition of a five year term.

THE LAW

POINT I

A SENTENCE IMPOSED UPON MISTAKEN FACTS IS SUBJECT TO REVIEW.

Normally, the merits of a Federal sentence is unreviewable. Gore v. U.S., 357 U.S. 386 (1958) cf A.B.A. Minimum Standards for Criminal Justice, Appellate Review of Sentences (approved draft 1968). Nonetheless, in U.S. v. Tucker 404 U.S. 443, (1972), the Court permitted the review of a District Court's sentence where it found reliance upon improper or inaccurate information as constituting a denial of due process.

While the sentence imposed herein is within the statutory limits, U.S. v. Velasquez, 482 F. 2d 139 (2 Circ. 1973) the sentencing procedure was obviously influenced by the erroneous and prejudicial information contained in the probation department's report.

While excessiveness of sentence is not a constitutionally reviewable subject, it would seem that the imposition of bail and the subsequent imposition of a maximum term of five years probation for an attorney who has otherwise led a blameless life and held a splendid reputation amongst the members of the Bar in his community, approaches, if it does not stand directly on, the question of "cruel and unusual sentence".

While there is no case law directly in point, it seems a gross miscarriage of justice and waste of the taxpayers' money to place the Appellant on five years probation. Is the Appellant a person in need of supervision by the probation authorities to assist and guide him in the direction of his life? We dare say not. If such is the case, as it most certainly is, the imposition of the maximum probationary term could only have been imposed for the express purpose of exacting punishment and humility from the Appellant.

It seems apparent on its face that once a decision had been made not to impose a jail sentence that the issue of punishment is forever closed. Probation is not and never should be used for the purpose of humiliation. While on this subject, it might be pointed out that Rule 8 of the Rules of

this Court direct that application for stays are to be made in the first instance to the sentencing Court. While that was done in that case, the stay in question was only granted to permit the Appellant to make further application to this Court. This Court, in its wisdom, granted the stay, and permitted the Appellant, like any other Appellant should be permitted, to pursue his appellate remedies.

In view of the previous good standing of the Appellant and all of the underlying meritorious and mitigating factors appearing in this record, and the errors in the probation report, the sentence imposed is erroneous and excessive and should be set aside.

CONCLUSION

The sentence imposed by the District Court in the case on appeal was based upon erroneous information, and under the circumsrances, is unduly harsh and should be set asile.

Respectfully submitted,

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A 202 Affidavit of Personal Service of Papers

LUTZ APPELLATE PRINTERS, INC.

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FEDERAL COURT
SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

- against -

ROBERT E. TATE,

Appellant.

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Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK) *ss.:*

I, Victor Ortega, *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 1027 Avenue St. John, Bronx, New York

That on the 30th *day of* August *19* 76 *at* 225 Cadman Plaza Brooklyn, N.Y.

deponent served the annexed appellant's brief *upon*

David Trager, U.S. Attorney Eastern District

the appellee *in this action by delivering* 2 *true copys thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* Attorney(s) *herein.*

Sworn to before me, this 30th
day of August *19* 76

Beth A. Hirsh

BETH A. HIRSH
NOTARY PUBLIC, State of New York
[illegible]
Commission Expires March 30, 1978

Victor Ortega

VICTOR ORTEGA